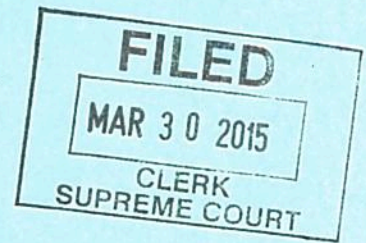


COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2015-SC-000575-D
2015-CA-00328
On Review From The Court of Appeals
Magoffin Circuit Court
2014-CI-00371



MAGOFFIN COUNTY BOARD OF ELECTIONS
RENEE ARNETT-SHEPHERD, MAGOFFIN COUNTY
COURT CLERK, CARSON MONTGOMERY, SUSIE
SALYER AND JUSTIN WILLIAMS IN THEIR OFFICIAL
CAPACITIES AS MEMBERS OF THE MAGOFFIN
COUNTY BOARD OF ELECTIONS

MOVANTS

VS.

BRIEF FOR JOHN MONTGOMERY

JOHN MONTGOMERY

RESPONDENT

AND

CHARLES HARDIN, M.D.

RESPONDENT

Submitted by....

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CERTIFICATE OF SERVICE

I certify that on March 29, 2016, I served ten copies of this Brief via registered mail to Susan Stokely Clary, Clerk, Kentucky Supreme Court, Room 209, Capital Building, 700 Capital Avenue, Frankfort, KY 40601; and one copy via US Mail to Samuel P. Givens, Jr., Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. John David Preston, Special Judge Magoffin Circuit Court, Johnson County Judicial Center, 908 Third Street, Ste. 217, Paintsville, KY 42140; Hon. James Nemes, Fultz, Maddox & Dickens PLC, 101 S. Fifth St. 27th Floor, Louisville, KY 40202; Hon. James L. Deckard, Hurt, Deckard & May, PLLC, 127 W. Main Street, Lexington, KY 40507; Hon. Eldred E. Adams, Adams and Adams, 110 E. Main Street, PO Box 606, Louisa, KY 41230; and hand delivered to Tonya Ward, Magoffin Circuit Court Clerk, Magoffin County Justice Center, Salyersville, KY 41465.

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This matter is set for oral argument on April 27, 2016 at 11:00 a.m.

COUNTER STATEMENT OF CASE

This case is an election contest filed by Appellee, John Montgomery against the Appellant/Magoffin County Judge Executive, Charles Hardin and the Magoffin County Election Board. The 2014 race for County Judge of Magoffin County resulted in an election whereby Appellee, John Montgomery received two thousand eight hundred ninety-nine (2,899) of the machine votes or fifty-four percent (54%) compared to two thousand, four hundred ninety (2,490) machine votes for Appellant, Charles Hardin. In addition, Appellee, John Montgomery, won ten (10) of the fourteen (14) precincts. (R.V. 7 at 782, Finding of Fact, Conclusion of Law & Judgment at 11). Despite Appellee, John Montgomery's four hundred nine (409) or eight percent (8%) victory at the polls, illegal absentee votes and other election fraud resulted in Appellee, Montgomery losing the election by twenty-eight (28) votes). The election fraud and irregularities in the absentee ballots rendered the legal votes cast for Appellee/Montgomery by the majority of the Magoffin County citizens worthless.

The Magoffin Circuit Court's Judgment issued by Hon. John David Preston, special judge, found "the number of absentee ballots cast in Magoffin County in the election was abnormally high, and...the percentages of votes cast in absentee ballots in the County Judge Executive race for the candidates was seriously out of proportion to the percentages of votes cast for the candidates on the voting machines." The court found additional irregularities and illegalities in the absentee voting, including:

- (1) Nine hundred ten (910) of the one thousand, one hundred forty-five (1145) (or 79%) of the applications for absentee ballots did not contain the voters social security numbers, which although not required by statute was on the form issued by the State Board of Elections and the Court correctly concluded the purpose of requiring the applicant's

social security number is to allow verification of the identity of the voter and to allow subsequent review of that verification.

- (2) Four hundred sixty-three (463) applications for absentee ballots did not list the voter's phone number;
- (3) Three hundred fifty-four (354) applications for absentee ballots (31%) did not list the place the voter was planning to be on Election Day as required by K.R.S. 117.085(2).
- (4) There were irregularities concerning fifty-nine (59) of the envelopes of absentee ballot applications. Eight (8) applications were missing the names of the person who made the request for the absentee ballots.

The aforementioned errors constituted violations of Kentucky Law and Board of Election policies. During in house absentee ballot voting at the County Court Clerk's Office, one hundred seventy one (171) absentee votes were cast at a time when there was not a Republican Election Commissioner present, thereby violating K.R.S. 117.085 1 (h). In addition, Larry Shepherd, a deputy clerk (and husband of County Court Clerk, Renee Arnett Shepherd) illegally assisted voters with their in house absentee voting (page 45 of Judgment by Special Magoffin Circuit Court Judge, Hon. John D. Preston).

This Court should take judicial notice that Larry Shepherd, along with three other individuals, was indicted by a federal grand jury on February 25, 2016 for buying votes for Charles "Doc" Hardin, Renee Shepherd, Magoffin County Court Clerk and member of the Magoffin County Board of Election, and Gary "Rooster" Risner, Magoffin County Magistrate, Indictment No. 15-CR-00018-S-DCR. Voting at least four of the precincts was also improperly handled (pg. 52 Judgment), as the election officers violated K.R.S. 117.227 which requires election officers to sign the precinct voter register and list the method of identification by which a voter's identity is confirmed.

The Court found at least four (4) voters cast ballots in exchange for payment or the expectation of payment, and other violations of the *Corrupt Practices Act* (hereinafter referred to as CPA) occurred when gravel was placed illegally on private property by county employees under Movant, Charles Hardin's supervision (p. 47 & 48 Judgment).

Contrary to Appellant's claim that there was no evidence submitted of voter misconduct, this court only needs to review the testimony of Maxie Arnett, who was approached on election day by Doug and Bryan Marshall, at the courthouse while the absentee votes were being counted. She was approached by these two gentlemen who wanted her to contact her aunt who worked for Dr. Hardin. VR 2-4-15 01:20:40. These gentlemen wanted Maxie Arnett to get them their money. She further stated the aunt of Maxie Arnett these two men were talking about was Bessie Brown and Maxie Arnett didn't want to call her aunt so these men could get their money because she (Maxie Arnett) had never bought or sold a vote in her life and she hoped her aunt had the same ethics. VR. 2-4-15 01:22:02- 01:22:35. While the hearsay rule prevented Maxie Arnett from stating exactly what these two men said to her, it is clear they wanted her to contact her aunt so they could get paid for selling their votes. It takes no great amount of intellect to determine who these men voted for and from whom they expected payment. Maxine Arnett recorded this conversation and this was turned over to the FBI and Attorney General's Office.

Even more disturbing is the testimony of voter Jerry Adams. He testified that he was picked up and taken to vote by his cousin Jason Helton and paid twenty five dollars (\$25) to vote. VR 2-03-15 11:28:44-11:28:45. He was told "I need to vote for Dr. Hardin to get the money." VR 02-03-15 11:29:45. He was assisted in voting by a man who has

the physical appearance of Larry Shepherd, he was tall, kind of stocky, white and bald headed VR 02-03-15 11:32:00 Jerry Adams further testified that after he voted, he and Jason Helton went to the Save A Lot parking lot, (a local shopping center), that Jason got into a grey car, must have gotten money there and paid him. VR 2-03-15 11:34:27-11:35:13. He further testified that he voted for Dr. Hardin 11:36:05. Clearly, Appellants argument that John Montgomery failed to produce evidence of voter misconduct is not correct.

The Trial Courts Findings of Facts wherein it found violations of the C.P.A. and specifically of vote buying cannot be set aside by this Court unless these findings are clearly erroneous. CR 52.01 “Due regard is to be given to the opportunity of the trial court to judge the creditability of the witnesses.”

The Court found violations of K.R.S. 117.255(31) which in essence states that when voters need assistance in voting, the election judge of the precinct voted the voter without the other election judge being present. (p 47 of Judgment).

The Circuit Judge issued a fifty-five (55) page Judgment with extensive Finding of Facts and Conclusions of Law; and the Circuit Court also summarized its review and findings concerning the relevant exhibits, including the voter assistant forms, absentee ballot applications and absentee ballots. Based upon these findings and the evidence before it, the Circuit Court concluded that the Board of Elections, the Magoffin County Clerk and/or election officers violated Kentucky Law and Board of Election policies by –

- 1) Receiving and issuing absentee ballot applications on incomplete voter applications; (p 48-49 Judgment);

- 2) Allowing a deputy clerk to assist voters, thereby violating 31 KAR 4:040(2) (p. 49-50);
- 3) Allowing in-house absentee balloting to take place in the absence of a Republican election commission violating K.R.S. 117.085(1) (h) [*Id.* at 50.];
- 4) Failing to count absentee ballots correctly violating K.R.S. 117.087(3) [*Id.* at 52.];
- 5) Allowing the Democratic election commissioners, acting as a judge, to individually assist absentee voters violating K.R.S. 117.255 (3) [*Id.* at 52-53.];
- 6) Allowing voters to be assisted by only one election judge at precincts violating K.R.S. 117.255(3) [*Id.* at 50-51.]; {“Notably, the circuit court based this decision on deficient voter assistance forms and the testimony of Simon and Mickey Marshall who were “apparently well-schooled enough prior to trial...to deny that they had sold their ballots, but were not well-schooled enough to deny that they had been assisted in voting”}.
- 7) Failing to properly verify the identity of a voter by failing to sign the precinct voter roster and list the method of identification by which the voter’s identity was confirmed violating K.R.S. 117.227 [*Id.* at 52].

Finally the Circuit court found violations of the CPA based on the evidence of vote buying and illegal placement of gravel on private property. [*Id.* at 51.]

The election contest was timely filed and it was alleged that a violation of the Corrupt Practices Act occurred. At the request of Appellee John Montgomery’s counsel a scheduling order was entered. The Hon. James Deckard, counsel for appellant Charles

Hardin requested the Court's indulgence in setting time limits due to his family's scheduled trip to Disney World.

The issue of whether the matter of irregularities in the absentee voting was properly plead was addressed in Appellee Montgomery's response to Appellant's Motion to Dismiss. A copy of this Response is attached in Appellees appendix. The response accurately stated "Montgomery has also challenged the absentee ballots as a class based on a substantial amount of votes being cast by people otherwise ineligible to vote...." In addition, on January 7, 2015 an extensive deposition of Appellant, Renee Arnett, the Magoffin County Court Clerk and Chairperson of the Magoffin County Election Board was taken. Renee Shepherd was questioned about the absentee ballot process and for Appellants to now claim that Appellants claim of irregularities in the absentee balloting was not properly plead and somehow took them by surprise is disingenuous at best.

The Appellants argument that this Court should overlook the blatant violation of KRS 117.085(2) which requires the person requesting an absentee ballot to state where he will be on election day, because these applications stated the reason the person was voting absentee was because they were sick is without merit. Absentee voting is a privilege not a right. One cannot assume these voters were at home on election day as Appellant requests. The Appellants argument that this violation of KRS 117.085(2) is of no significance has the effect of nullifying this statute and should not be condoned by this Court.

The failure to properly fill out the absentee ballot application, by failing to list the location of the voter on election day which is mandatory as per KRS 117.085(2) renders these absentee ballots ineligible to be counted.

The one issue counsel for Appellee John Montgomery and the capable counsel for Appellant Magoffin County Board of Elections agree on is that this court should consider the testimony of Justin Williams. He was not present for four and a half (4 ½) days of the absentee balloting, these days being Monday, Tuesday, Wednesday, Thursday and one-half of Friday. VR 02-09-15 01:41:33. He had no knowledge of what went on outside of the court house, and does not have any idea if anyone was paid to vote. VR 2-09-15 01:43:32-01:44:08. He only recalled one instance where Larry Shepherd also assisted a voter, but upon cross examination and upon reviewing voter assistance forms it was determined that Larry Shepherd also assisted BF Holbrook VR 02-09-15 01:46:44, Anna F. Minix VR 2-09-15 01:47:39 and Mary J. Risner VR 2-09-15 01:48:23 in voting. This all occurred while Justin Williams was an election officer at the County Clerk's Office with regards to absentee voting. Justin Williams admitted that the statutes regarding absentee balloting should be strictly followed VR 2-9-15 01:51:36. He further admitted he was e-mailed guidelines before he became a Republican Commissioner and these guidelines told him how to count absentee ballots. VR 2-9-15 1:52:39. In spite of receiving the guidelines and believing they should be strictly followed, he was of the opinion that it is impossible to follow the statutes on counting absentee ballots due to his mistaken belief they had to be counted by 6:00 p.m. on election day. VR 02-09-15 1:53:08-1:54:08.

Instead of following the clear mandates of KRS 117.087(3) regarding the counting of the absentee ballots, the Magoffin County Election Board simply distributed the ballots among the election board members who opened up the absentee envelopes and checked the signature. KRS 117.087(3) mandates that each absentee ballot is to be

removed from the ballot box one at a time and as each envelope is removed, it shall be examined to ascertain whether the outer envelope and the detachable flap are in proper order and have been signed by the voter. Instead of following this simple procedure, the election board removed all ballots at once and it became a free-for-all between the election officers to examine the ballots, envelopes, detachable flap and signatures. The statute requires the chairman of the County Board of Elections (Renee Shepherd) to compare the signatures of the outer envelope and the detachable flap with the signature of the votes that appears on the registration card. While Renee Shepherd may have examined some of the ballots, it is clear that the members of the Board of Elections examined the majority simply to save time. Simply stated, Renee Shepherd, the Magoffin County Clerk and Chairman of the Magoffin County Board of Elections delegated her statutory duty to the members of the Magoffin County Board of Elections, making it difficult, if not impossible, for an observer to determine if the absentee ballots were properly counted.

Kim Gevedon testified for Appellee John Montgomery. Mr. Gevedon is a political consultant. He testified that absentee voting generally tracks election day results with a variance of three percent (3%) to ten percent (10%) one way or another. He further testified that in this case Appellee John Montgomery received fifty four percent (54%) of the machine vote and Charles "Doc" Hardin got forty six percent (46%) a difference of 7.8% which is not a particularly close race. He stated the absentees should generally reflect the machine vote, yet in this case there was a dramatic shift of votes thirty eight percent (38%) in favor of Charles "Doc" Hardin. He further testified that there were one thousand one hundred forty five (1,145) absentee ballots cast in the 2014 election which

was a thirty two percent (32% increase in the 2014 primary election. He testified that Magoffin County had twice the number of absentee ballots as Floyd County, but Floyd County had three times the population Magoffin County had more absentees than any other county in Eastern Kentucky by double. He was of the opinion that there was no legitimate explanation for the above, see paragraph 10 pages 11 and 12 of Trial Courts Judgement. This testimony along with the irregularities in the absentee applications, voting and counting of the votes is ample evidence that supports the Trial courts Judgment to void the election.

ARGUMENT I

JOHN MONTGOMERY PROPERLY PLEAD HIS CASE

Count 69 of the original Petition stated violations of KRS 117.075-088 by providing absentee ballots to people ineligible to vote...and other irregularities affecting the fairness of the vote. The trial court properly determined that violations of KRS 117.085(2) occurred when it found that 354 applications for absentee ballots (31% of the ballots cast) did not list the place the voter was planning on being on election day. The Trial Court also found other irregularities concerning 59 of the envelopes of absentee ballot applications.

On January 7, 2015, Appellee John Montgomery's Counsel took the deposition of Renee Shepherd, Magoffin County Court Clerk and Chairperson of the Magoffin County Election Board. She was questioned at length about the absentee votes. Prior to the deposition of Renee Shepherd, John Montgomery filed a response to the Defendant's Motion to Dismiss. In this response, which was file December 30, 2014, John Montgomery made it clear he was challenging the absentee ballots as a class. Under these

circumstances it is hard for this practitioner to understand how Counsel for Defendant's were ambushed or taken by surprise by John Montgomery's claim of irregularities in the absentee balloting and counting of same.

The Petition, discovery and subsequent pleadings more than met the requirements necessary to provide Defendant's notice of the issues involved in this election contest. Appellant Hardin seeks to impose a "heightened pleading standards of election contest." What Appellant Hardin seeks to impose on Appellee Montgomery has no basis in law, statute or the rules. CR 1(2) states that the Civil Rules "given procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over an inconsistent procedure set forth in the rules." The election contest procedure statute makes no mention of the heightened pleading standard but rather only requires that the Petition "state the grounds of the contest relied on" KRS 120.155

Courts examine the sufficiency of a petition in an election contest under CR 8.01, colored by the statutory language and case law relative to KRS 120.155, requiring that the petition "state the grounds fo the contest relied on." As such, "[i]f the defendant is given notice by the pleading of what kind of a ground of contest is being asserted, that should be sufficient for pleading purposes." Upton v. Knuckles, 470 S.W.2d 822, 825-26 (Ky. 1971). "Where the pleading is open to construction, a meaning which will reasonably support it should be adopted rather than one which will defeat it." Pickard v. Jones, 243 S.W.2d 46, 50 (Ky. 1951). Particularly in election contest actions with expedited time limits, "technical objections to pleadings should be disregarded and the pleadings should be given a rational construction according to their general scope and

tenor.” Upton, 470 S.W.2d at 825 (citation omitted). Furthermore, Kentucky law does not require a petitioner name specific voters to challenge when contesting absentee votes as a class or violations of the CPA. Arnett v. Hensley, 425 S.W.2d 546, 549 (Ky.1968).

The Appellants argument that Appellee John Montgomery went on a “fishing expedition” due extensive discovery is without merit. Kentucky Courts have held that the statutory framework under KRS 120.165 allows for both Petitioners and Respondents “to take depositions whether for discovery purposes or for use as evidence at any time after the action has commenced” Britton v Garland 335 S.W. 2d 329, 330-331 (Ky 1960).

The scheduling of the time parameters of this contest was never contested by Appellants and thus not preserved for appeal. Where parties agreed to extension of time to take the evidence, the parties cannot later complain as to the agreed time table. Francis v Sturgill 174 S.W. 753, 755 (Ky 1915) The above mentioned scheduling order was entered after a conference call when all parties agreed to the dates following the request of Hon. James Deckard for a delay in the scheduling time limits so he could go on a previously scheduled family vacation.

Appellant John Montgomery completed and delivered to opposing counsel all exhibits, affidavits and depositions within the agreed upon thirty (30) day deadline. The Appellant’s request for extension of time to seek and review absentee ballots was filed within the thirty (30) day window. Rv.2 at 163; v.3 at 349-Rv.1 at 46-47.

ARGUMENT II

THE BOARD OF ELECTIONS DID NOT SUBSTANTIALLY COMPLY WITH THE ABSENTEE VOTING STATUTES.

Kentucky Courts have long recognized that “the right to vote by absentee ballot is a special privilege granted by the Legislature which may be exercised only under specified conditions. The method of absentee voting is completely separable from the regular system of voting...There should be substantial compliance with all the statutory regulations governing absentee voting.” Ragan v Burnett 306 SW 2d 281 283 (KY 1957). “The privilege (of voting absentee) is granted under the specific conditions that all of the procedures set out in the legislative act be complied with. Irregularities in the procedures cannot be tolerated...” Parrigan v Sawyer 457 SW 2d 504, 508 KY (1970). The evidence in this case showed a number of violations of Kentucky Law and policies governing absentee voting. Renee Shepherd, the Magoffin County Clerk, testified as to the process and procedures followed by her office and the Board in handing out absentee ballot applications – procedures that resulted in complete failure to ensure absentee voters provided all of the information required to vote absentee.

For example – nine hundred ten (910) out of the eleven hundred forty-five (1145) or 79%) of the applications did not contain a social security number as required on the form prescribed by the State Board of Elections [Judgment at 45]. As the Circuit Court concluded:

The purpose of requiring the inclusion of a social security number on the application is to allow the verification of the identity of the voter, and to allow a subsequent review of that verification. In this case an overwhelming majority of absentee ballot applications did not contain a social security number, and the Court is unable to

conduct a review of the validity of those applications in the absence of such indication. [Judgment at 49].

K.R.S. 117.085(2) also expressly requires each absentee ballot application to contain a “statement of where the voter shall be on Election Day”, yet three hundred fifty-four (354) of the eleven hundred forty-five (1145) absentee applications (or 31%) did not contain such a statement (Judgment at 45). The failure of the Board to insure that the Absentee Ballot Applications contained the information required by K.R.S. 117.085(2) resulted in three hundred fifty four (354) ineligible absentee ballots being cast. Based upon the ratio of the absentee votes if these ballots had not been counted the Respondent/Montgomery would have won. The evidence showed members of the Board served during in-house absentee balloting process as the above stated officers but that the Board performed in house absentee balloting without a Republican judge for almost a full week in violation of K.R.S. 117.085(1)(h). [Judgment 7, 42].

The in-house absentee voting also violated Kentucky Statute and the Kentucky Constitution. Ky. Const. 147 (“[A]ll elections by the people shall be by secret ballot...and marked by each voter in private at the polls...”); K.R.S. 117.086(4) (“the clerk shall designate a location within his office where the ballots shall be cast secretly.”) The constitution right to a secret ballot “is mandatory.” Muncy v Duff, 239 S.W. 49, 53 (KY 1922). Yet, the Board Chair, Clerk Shepherd testified she could hear how some in-house absentee voters cast their ballots when voters voted with assistance due to the small space [VR No. 1: 2/2/15; 11:25:18.]. An in-house absentee vote challenger also testified he could hear voters talking with those providing assistance and occasionally for whom the voter cast a ballot [VR No. 4: 2/2/15, 11:32:45; 11:30:28]. This failure also violated 31 KAR 4:04 1 (2) which requires “the designated [in house absentee polling].

Additional evidence of improprieties in the in-house absentee voting including Jerry Adams' testimony that he received twenty-five dollars (\$25) to cast an in-house absentee ballot for Hardin. [Judgment at 17-18]. Adams further testified a man fitting the description of deputy clerk, Larry Shepherd, husband of Clerk Shepherd, assisted him in voting [VR No. 2:2/3/15; 11:31:45].

Clerk Shepherd and other members of the board also gave detailed testimony about the illegal manner in which the Board counted the mail-in absentee ballots, including the involvement of all Board Members in verifying signatures at the same time and the Board's refusal to put the ballots back into the ballot box to mix them up. As explained by the Clerk, the Board spread the mail-in absentee ballots out and organized them by precinct order instead of taking them out one at a time to examine each envelope individually. However, K.R.S. 117.087(3) provides that "[t]he board shall open the boxes containing absentee ballots returned by mail and remove the envelopes one (1) at a time." The Clerk, as Board Chair, also failed to individually examine and compare each outer envelope and detachable flap with the corresponding voter registration card. *See id.* ("The chairman of the county board of elections shall compare the signatures on the outer envelope and the detachable flap with the signature of the voter that appears on the registration card."). Finally, the Clerk did not read the name of the voter following this process to allow for a challenge. *See id.* ("If the outer envelope and the detachable flap are found to be in order, the chairman shall read allow the name of the voter.").

Thus, the individual attention mandated by the General Assembly to be given to each absentee ballot during the counting phase devolved into a free-for-all where each counter paid attention to his/her own pile instead of each absentee ballot. Thomas

Vastrick, a handwriting expert, testified at least forty-three (43) of the signatures used to validate mail-in absentee ballots contained significant characteristic difference, no doubt a result of insufficient verification due to the statutory failures of the Board. [Judgment at 15]. This complete lack of respect for strict counting procedures demanded by law could have allowed for the insertion of illegal ballots and certainly prevent the opportunity for a proper challenge to the bona fides of absentee voters and their ballots.

Finally, substantial evidence supported the Circuit Court's finding that the absentee vote totals were simply incredible. "In the absence of some plausible explanation, it would be supposed that the general ratio of voting as between poll voters and absentee voters would be more nearly equal." Arnett v Hensley, 425 S.W. 2d 545, 553 (KY 1968). The absentee and precinct numbers in the 2014 general election for Magoffin County Judge Executive show absolutely no correlation. Montgomery won the votes cast on Election Day by a healthy, comfortable margin of eight points. {Judgment at 11-12}. Hardin won the absentee vote by a staggering thirty-eight percent (38%) point margin [69% (791) to 31% (354)] amount the one thousand one hundred forty-five (1145) absentee ballots cast. [Id.] The evidence also showed Magoffin County voters cast an astonishing amount of absentee votes in this election compared to neighboring counties, more than doubling any county in Eastern Kentucky. And while voter turnout in the 2014 general election only increased by 14.1%, absentee voters in the 2014 general election increased by a staggering 32.3%. [Id.] This wild increase in absentee ballots cast and the dramatic difference between the results at the precincts and during absentee voting raises serious suspicions and cannot be condoned.

ARGUMENT III

FAILURE TO SUBSTANTIALLY COMPLY WITH THE STATUTES REGARDING ABSENTEE BALLOTS IS GROUNDS TO SET ASIDE THE ELECTION

The Board of Elections would like this Court to believe that the Trial Court's decision has lowered the legal standard to set aside an election. Nothing could be further from the truth. The Board's argument that Montgomery had to present the testimony of voters to support his election contest presents a completely incorrect statement of law. In Ellis v Meeks, 957 SW 2d 213, 216 (KY 1997), the Kentucky Supreme Court expressly did away with any notation that a contestant must have voters of questionable legality testify how they voted in an election contest to prevail. "To require appellant to show that a voter changed his vote as a result of (contestee's) actions would put an unreasonable burden on challengers by forcing them to subpoena each and every voter in an effort to find one who change his/her vote as a result of the misdeeds of the prevailing candidate." The Court of Appeals recognized that the Trial court's Findings of Facts were supported by substantial evidence. This Court should not disturb the ruling of the Court of Appeals.

The Trial Court's Judgment and its affirmation by the Court of Appeals does not create new law, rather it simply upholds current case law. The case of Warren v Rayburn 267 SW 2d 720, 72 (KY 1954) is remarkably similar to the case presently before this Court. Warren, was a case between two candidates for sheriff of Green County. Rayburn won the election in the precinct polling but lost by a disproportionate number in the absentee ballots and thus lost the election. The County Court Clerk utterly failed in his duties to insure substantial compliance with laws regarding absentee ballots. The Warren Court ruled "there must be substantial compliance with statutory regulations regarding

absentee ballots...” The Warren Court held “If approved and the election of the contestee upheld it would be an invitation to every County Clerk in the state to adopt his own method of practice in the conduct of absentee voting and would open wide the door to fraudulent practices”.

Where there is not a substantial compliance with the absentee voting statutes the Court has the authority to invalidate the election even if there is no showing that the failure to substantially comply with these statutes impacted the election. In the Warren case the Court threw out the absentee ballots due to the lack of substantial compliance. Failure to substantially comply with the statutes enacted to insure fair absentee voting is sufficient in and of itself to throw out the absentee ballots or to declare that the election is invalid.

The Trial Court’s decision to void the entire election is well grounded in Kentucky Law. K.R.S. 120.165(4) was cited in paragraph 14 of the *Conclusion of Law* of the Trial Court’s Judgement. This statute allows the court to set aside an election under the circumstances of this case. The most recent case on this matter, McClendon v Hodges, KY, 272 SW 3rd 188 (2008) stated that this remedy is necessary when it is impossible to fairly discern a winner. The Court’s finding on this matter is supported by substantial evidence and should not be disturbed by this Court.

Election Boards must follow the regulations and procedures set forth by the Commonwealth; and a Court must be prepared to disenfranchise voters if the Board fails to (1) substantially comply with the law; and (2) the evidence shows that proper ends were not reached. Arnett v Hensley 425 SW 2d 546 (KY 1968). Proper ends were also clearly not reached in the administration and casting of absentee ballots in this case. The

Court need not find actual fraud “on the part of those in charge of absentee balloting” Warren v Rayburn 267 SW 2d 720, 721 (KY 1954). The disproportional numbers of votes cast on Election Day compared to the absentee ballots require “those in charge to show the balloting was fairly conducted and that all of the requirements of the law designated to insure its fairness were substantially complied with.” (Id at 721).

The Circuit Court correctly found nine hundred and ten (910) applications for absentee ballots (or 89% of the county wide total) did not contain information necessary for verification of voter registration status; 354 applications did not contain the location of where the voter would be on Election Day as required under Kentucky statute; one hundred seventy one (171) voters cast illegal votes due to the lack of a republican challenger during in-house absentee voting; and another undetermined number of voters had questionable verification signatures. In addition, four (4) in-house absentee voters cast illegal ballots after receiving assistance from a deputy clerk, and one (1) person cast an illegal in-house absentee ballot for Hardin after receiving payment. It is entirely possible those violations affected far more than ninety percent (90%) of the absentee voting pool.

CONCLUSION

The Magoffin County Board of Elections failure to substantially comply with the election laws regarding absentee balloting is grounds to set aside this election and this Court should not disturb the Trial Courts decision affirmed by the Court of Appeals.

Respectfully submitted....



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